

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7498

~~76-8317~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALVIN TROTMAN and FRANKLIN MITCHELL,
Plaintiffs-Appellees,
-against-

THE PALISADES INTERSTATE PARK COMMISSION,
MORGAN CLARK, JOHN DOE OFFICERS OF THE
PALISADES INTERSTATE PARK COMMISSION 1-3,

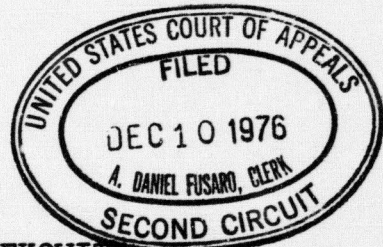
Defendants,

PALISADES INTERSTATE PARK COMMISSION,
Defendant-Appellant.

B

P/S

APPELLANT'S REPLY BRIEF



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-Appellant
The Capitol
Albany, New York 12224
Telephone: (518) 474-2432

RUTH KESSLER TOCH
Solicitor General

PETER J. DOOLEY
Assistant Attorney General
of Counsel

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Defendant-Appellant.

APPELLANT'S REPLY BRIEF

I

Park Commission Revenue and Employees

Respondents assert on page 5 of their brief that the Commission generates revenue beyond its State appropriation. The statement is correct, so far as it goes, but it must be pointed out that all such revenue from parking fees, camping fees, etc., are not retained by the Commission, but are paid over to the State Comptroller for amortization of State indebtedness resulting from the sale of bonds for any and all State parks (State Finance Law, § 82 [full text of statute annexed hereto]). The Commission's operating budget, therefore, consists almost

entirely of State appropriations;* and fees collected for use of Commission facilities do not comprise any part of the Commission's assets.

The Commission does not contend, as respondents imply also on page 5 of their brief, that the Commission is liable only for contractual obligations. The Commission maintains solely that its liability--unless otherwise specifically waived by statute--whether tortious or contractual, can only be litigated in the New York State Court of Claims.

Thirdly, the respondents on pages 6 and 7 of their brief, argue that Commission employees are only considered State employees for purposes of receiving civil service benefits. However, Article VII, section 1 of the Compact, and section 9.09 of the Parks and Recreation Law clearly provide that such employees are to be considered State employees for purposes of tort liability. The Commission, so far as its New York State operations are concerned, can only appoint New York State Civil Service certified eligibles to positions created by appropriations in the Commission's budget as passed by the State Legislature. The Commission can only recommend the employment position and quantity of staff. The position is then established or eliminated by the Legislature, in approving the budget, or in specific legislation.

* The Commission does on occasion receive gifts and bequests, which are expended exclusively as directed by the donor, and certain rental income solely from a single facility, The Bear Mountain Inn. The Commission does not receive any federal funding.

In reality, the Commission has only one employee, who is separately provided for in the budget. All other employees are employees of the State of New York, or the State of New Jersey. The single Commission employee is the General Manager, who receives a salary paid in part from Commission funds appropriated to the Commission for such purpose by the New York State Legislature, and paid in part by the State of New Jersey. All other employees in the New York State operation of the Park are paid directly by the State of New York and are State employees.

II

Immunity

The respondents further argue on page 9 of their brief, that the Park Commission, even as a State agency, is a person not entitled to immunity, citing Forman v. Community Services, 500 F. 2d 1246 (C. A. 2d, 1974). (Forman was reversed on other grounds sub nom. United Housing Federation, Inc. v. Forman, 421 U. S. 837 [1975]). In Forman, however, there was jurisdiction pursuant to section 17(a) of the Securities Act of 1933 (15 U.S.C. 75q[a]). The Court in Forman cited Matherson v. Long Island State Park Commission, 442 F. 2d 566 (2d Cir., 1971) and Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y., 1961). Zeidner, while holding the New York State Thruway Authority was not an alter ego of the State, still dismissed the action on the ground of limited immunity since New York courts held the Thruway could only be sued in the

Court of Claims (exactly the situation herein); and Matherson, while conceding that the Long Island State Park Commission was probably immune, reversed a dismissal as to the Jones Beach Parkway Authority, relying solely on Zeidner.

Both cases are actually supportive of appellant's position herein. In any event, this Court in Monell v. Dept. of Social Services, et al., 532 F. 2d 259 (C. A. 2d, 1976), dismissed Forman as controlling authority for the position respondents are urging, saying (at p. 263):

"To the extent that the language of the Forman opinion may be read to imply that all 'agencies' are persons under sec. 1983, 500 F 2d at 1225, we are not bound by the broad nature of the generalization and we doubt that it was so intended."

It is respectfully submitted that the Palisades Interstate Park Commission is not a person within the meaning of section 1983, and shares State immunity under the Eleventh Amendment.

III

Considerability of other Defenses Apparent on the Face of the Pleadings

Finally, respondents assert in Point III of their brief (pp. 11, 12) that the Statute of Limitations and other defenses cannot be raised on this appeal, and further allege that co-defendant Morgan Clark has been served with process in this case. As of this writing, December 1, 1976, Morgan Clark has not been served. Moreover, the additional defenses asserted in appellant's

brief, viz., statute of limitations and lack of subject matter jurisdiction have been affirmatively asserted in defendant's answer, are part of this record, and are readily apparent from the face of the complaint (Suckrow Borax Mines Consolidated v. Borax Consolidated, 185 F. 2d 196 [9th Cir., 1950], cert. den., 340 U. S. 943, cert. den. 342 U. S. 912; Wagner v. New York, Ontario & Western Railway, 146 F. Supp. 926 [M. D., Pa., 1956]; Schandelman v. Schuman, 92 F. Supp. 334 [E. D., Pa., 1950]). Therefore, they may be considered on this appeal, even though such issues have not been specifically certified. (Cf. Smith v. Vulcan Iron Works, 165 U. S. 518; Katz v. Carte Blanche Corp., 496 F. 2d 747 [3d Cir., 1974], cert. den. 419 U. S. 885; Hurwitz v. Directors Guild of America, Inc., 364 F. 2d 67 [2d Cir., 1966], cert. den. 385 U. S. 971; Mercury Motor Express, Inc. v. Brinke, 475 F. 2d 1086 [5th Cir., 1973]; Orth v. Transit Investment Corporation, 132 F. 2d 938 [3d Cir., 1942].)

IV

CONCLUSION

THE ACTION SHOULD BE DISMISSED
AS TO DEFENDANT PALISADES
INTERSTATE PARK COMMISSION.

Dated: December 1, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-Appellant
The Capitol
Albany, New York 12224
Telephone: (518) 474-2432

RUTH KESSLER TOCH
Solicitor General

PETER J. DOOLEY
Assistant Attorney General
of Counsel

V

State Finance Law, Art. 6

"§ 82. Outdoor recreation development account

"All revenues derived by the state after March thirty-first, nineteen hundred sixty-six from fees and other charges of any nature made for the use of state parks and other state recreational facilities under the jurisdiction of any regional state park commission¹ or the division of lands and forests, all state facilities under the jurisdiction of the Saratoga Springs Commission,² and all historic sites under the jurisdiction of the New York state historic trust; and revenues apportioned by law from receipts of the tax on gasoline and similar motor fuel and from motorboat registration fees, shall be paid by the state comptroller into a special account, to be known as the 'Outdoor Recreation Development Account', and shall be used for the payment of interest on and the amortization or discharge of any indebtedness incurred by the state resulting from the sale of bonds sold pursuant to the park and recreation land acquisition bond act, the park and recreation land acquisition bond act of nineteen hundred sixty-two and the outdoor recreation development bond act, including the cost of preparing and selling such bonds. Any monies in the account not required for debt service in the next succeeding three years shall be available after appropriation for outdoor recreation projects and for projects undertaken pursuant to article eleven of the navigation law.

Added L.1965, c. 558, § 9; amended L.1966, c. 815, § 8.

¹ Now regional park and recreation commissions.
See PRL § 7.03.

² Now the Saratoga-Capital district state park and recreation commission. See PRL § 7.03."

AFFIDAVIT OF SERVICE

Alvin Trotman & Franklin Mitchell,
Plaintiffs-Appellees,

-against-

The Palisades Interstate Park
Commission, et al.,
Defendants-Appellants.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:

I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the appellant herein.

On the 8th day of December 1976 I served
the annexed appellant's reply brief upon the
attorney named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorney at the
address within the State respectively theretofore designated by
him for that purpose as follows:

James S. Carroll, III, Esq.
126 West 119th Street
New York, New York 10026

Sworn to before me this

8th day of December 1976

Raymond J. Canardo

Notary Public, State of New York

No. 401847

Qualified in Albany County

Commission Expires March 22, 1977

Beverly J. Smith